

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

TASER INTERNATIONAL, INC., <i>et al.</i> ,	)	
	)	Case No.: 1:10-cv-3108-JEC
Plaintiffs,	)	
	)	[On removal from the State
v.	)	Court of Fulton County,
	)	Georgia Case No.:
MORGAN STANLEY & CO., INC., <i>et al.</i> ,	)	2008-EV-004739-B]
	)	
Defendants.	)	
	)	

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**PLAINTIFFS' MOTION FOR TELEPHONE CONFERENCE WITH THE  
COURT REGARDING AUTHORIZING SPECIAL MASTER TO  
COMMENCE WORK ON DISCOVERY MOTIONS**

Prior to the filing of the Removal Notice in this action, the parties, at the Court's suggestion, had agreed to the appointment of a Special Master, Henry D. "Hank" Fellows, Jr., to hear and determine all discovery motions. The parties' agreement was memorialized in a **Court Order**, which was in effect at the time of removal.

After removal and the Plaintiffs' indication that they would file a motion to remand, the Defendants confirmed that they were still agreeable to allowing Mr. Fellows to proceed and, indeed, federal law provides that the State Court's Order appointing Mr. Fellows remains in full force and effect after removal unless

modified or dissolved by this Court. After removal, Mr. Fellows indicated, however, that he would not proceed in the absence of direction from this Court. With fact discovery presently set to end in a few months and 26 discovery motions currently pending, Plaintiffs request a telephone conference with the Court and counsel for the Defendants to discuss authorizing Mr. Fellows to proceed immediately with resolving the pending discovery motions.

### **Background**

At the outset of a hearing on approximately 10 discovery motions then pending in this action, the State Court of Fulton County, Hon. Patsy Y. Porter, stopped the hearing and announced the Court's intention to appoint a Special Master to hear and determine all discovery motions. The parties subsequently jointly agreed upon Mr. Fellows to serve as the Special Master, and the Court so appointed him, ordering:

The Special Master shall have the duty and power to supervise all aspects of discovery and to resolve issues and disputes concerning all matters related to discovery ....

Order Appointing Special Master, State Court of Fulton County, September 15, 2010 at 2, a copy of which is attached hereto as Exhibit A. At that time, there were 19 discovery motions pending. *Id.* at 7-9. The parties provided Mr. Fellows with the briefing on all pending motions but, before Mr. Fellows could begin work, on

September 29, 2010, Defendant Merrill Lynch Professional Clearing Corp., which had recently been added to the case as a defendant, removed the case with the consent of all Defendants [Dkt. # 1]. Plaintiffs filed a Motion to Remand the case back to State Court on October 6, 2010 [Dkt. # 7]. The Motion to Remand argues that the asserted basis for removal was improper and the Court should award Plaintiffs their attorneys' fees for opposing the improper removal. *Id.* at 1.

Defendants confirmed on September 30, 2010 that they are agreeable to having Mr. Fellow continue in the role of Special Master for discovery motions despite the removal. *See* attached Exhibit B at 2-3. Thus, regardless of whether the Motion to Remand is successful, the discovery motions will be decided by Mr. Fellows. However, Mr. Fellows indicated that because he was appointed by the State Court, he would await direction from this Court before proceeding. *See* Email from Hank Fellows to Richard Sinkfield dated September 30, 2010, a copy of which is attached hereto as Exhibit B at 1.

There are currently 26 pending discovery motions. *See* list of pending discovery motions attached hereto as Exhibit C. Merits discovery is presently set to end on March 31, 2011 according to a scheduling order entered by the State Court. Scheduling Order dated July 16, 2009, a copy of which is attached hereto as Exhibit D and Stipulation and Order, attached hereto as Exhibit E. Plaintiffs

are increasingly concerned about the delay being caused by what they contend is an improper removal.

**Relief Requested and Citation of Authority**

Plaintiffs request a telephone conference with the Court and all parties to discuss the Court's instructing the Special Master to proceed with hearing and deciding the discovery motions while the Plaintiffs' Motion to Remand is pending.<sup>1</sup> Not only do the parties agree upon Mr. Fellows serving as Special Master for discovery motions, but the State Court's order, entered prior to removal, appointing Mr. Fellows as the Special Master and charging him with ruling on the parties' discovery motions remains "in full force and effect" despite removal, pursuant to 28 U.S.C. § 1450. Defendants have indicated that this is their understanding as well, in a communication with Mr. Fellows:

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<sup>1</sup> Although the Defendants have now refused to jointly request this telephone conference with the Court, in the Joint Preliminary Report [Dkt. # 63], Defendants requested a conference on this very issue and confirmed their continuing agreement to Mr. Fellows serving as Special Master to decide discovery motions:

In order to determine how the Court wishes to proceed with discovery in this matter, particularly in light of Plaintiffs' motion for remand, **Defendants request a conference with the Court** concerning the outstanding discovery in this action and the pending motions. Should the Court determine that it is appropriate for the Special Master to continue to oversee discovery and/or to hear any or all of the pending motions, **Defendants have no objection to the continuation of Mr. Fellows in that role.**

Joint Preliminary Report at 21-22 (emphasis added).

1. Defendants recommended and consented to your appointment as Special Master following Judge Porter's statement in open court that she had decided to refer the discovery motions in this matter to a special master.

2. **Defendants agree and understand that 28 USC § 1450 provides that orders entered in the court of initial jurisdiction remain in force and effect until and unless modified by the district court to which the case is removed. Defendants, of course, understand that to include the order appointing the Special Master.**

Email from Richard Sinkfield to Hank Fellows dated Sept. 30, 2010, Exhibit B at 2 (emphasis added).

Thus, **whether the Motion to Remand is granted or denied**, Mr. Fellows will determine the discovery motions unless this Court orders otherwise. With the large number of discovery motions that are pending and the relatively short time currently remaining in the discovery period, the interests of the parties and of judicial economy would best be served if Mr. Fellows proceeded to carry out his duties without delay.

Plaintiffs therefore respectfully request that the Court schedule a telephone conference to discuss with the parties the Court's instructing Mr. Fellows to proceed immediately with his appointed duties.

This 8th day of December, 2010.

/s/ Jill A. Pryor

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day, a true and correct copy of the foregoing **PLAINTIFFS' MOTION FOR TELEPHONE CONFERENCE WITH THE COURT REGARDING AUTHORIZING SPECIAL MASTER TO COMMENCE WORK ON DISCOVERY MOTIONS** was electronically filed with the Clerk of Court using the Court's electronic filing system which will automatically send an email notification of such filing to the following attorneys of record who are registered participants in the Court's electronic notice and filing system:

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Further, I hereby certify that on this day, I served a true and correct copy of the foregoing via United States mail and email to the following:

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This 8th day of December, 2010.

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